Supreme Court, U.S.
FILED
AUG 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

90 No. 238

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD ROSENSTEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS P. BRANDT
Assistant City Attorney
Office of the City Attorney
1500 Marilla Street
City Hall 7BN
Dallas, Texas 75201
(214) 670-3510

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a municipality can be held liable under 42 U.S.C. §1983 for an unconstitutional policy or custom of failing to provide a name-clearing hearing to a discharged probationary employee when the only evidence of such a policy is a single incident in which the discharged employee failed to request a hearing.

2. Whether, in an action under 42 U.S.C. §1983 for denial of a name-clearing hearing, a discharged probationary employee is entitled to recover damages for general loss of reputation.

3. Whether a police chief can be considered a policymaker under 42 U.S.C. §1983 when his actions and decisions are subject to supervision and control by the city manager and ultimately by the city counsel.

4. Whether the district court erred in failing to submit to the jury a special issue to determine whether the discharged employee requested a name-clearing hearing.

5. Whether the district court committed plain error by submitting damages issues disjunctively thus allowing recovery for denial of a name-clearing hearing or for slander.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 10

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Carey v. Piphus, 435 U.S. 247 (1978) 8

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 10

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) ...7, 8

Owen v. City of Independence, 455 U.S. 622 (1980) 7

Paul v. Davis, 424 U.S. 693 (1976) 8

Pembaur v. City of Cincinnati, 474 U.S. 469 (1986) ...7, 8

Perry v. Sindermann, 408 U.S. 593 (1972)..... 7

CONSTITUTION AND STATUTES:

U.S. Const: Amend. XIV (Due Process Clause) 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343..... 3

42 U.S.C. §1983..... *passim*

No. _____

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD ROSENSTEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The City of Dallas, Texas respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 21 – App. 29) is reported at 901 F.2d 61. The opinion of the panel of the court of appeals (App. 1 – App. 20) is reported at 876 F.2d 392. The judgment of the district

court (App. 30) and order of the district court denying petitioner's motion for new trial, motion for judgment n.o.v. and motion for partial judgment (App. 31) are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on May 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides:

> No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law; * * * .

2. Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, *** subjects, or causes to be subjected, any *** person *** to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * * .

STATEMENT OF THE CASE

In March 1984, Amy Bradley, a Dallas police officer, received several harassing and obscene telephone calls. Bradley named Respondent Howard M. Rosenstein, a fellow police officer, as the person who made the calls. An Internal Affairs Department investigation concluded that Rosenstein had made the calls, and Rosenstein was terminated from his position as a Dallas police officer. Rosenstein had been employed by the City of Dallas for less than one year and was a probationary employee at the time of his termination. Shortly thereafter, police Captain Donald Milliken made public the charges against Rosenstein in statements to the press concerning the discharge. Rosenstein sought to challenge the decision of the police department to terminate him. Rosenstein's request for an appeal stated: "On May 10, 1985, I was fired from the Dallas Police Department for something that I did not do. I received the formal written confirmation of my termination from Chief Prince on May 14, 1985. I hereby request an appeal from this decision." Rosenstein was denied further consideration or hearing on the ground that no appeals procedure was available to one in his status as a probationary employee.

Rosenstein denied that he made the telephone calls and brought this action in the Northern District of Texas seeking damages for violation of his constitutional rights pursuant to 42 U.S.C. §1983 and for violations of state law. Rosenstein's §1983 claim was based principally upon the City's alleged failure to provide a name-clearing hearing to him. His state law claims for slander were based on the statements of Captain Milliken. The jurisdiction of the district court was invoked under 28 U.S.C. §1343.

The case proceeded to trial on Plaintiff's consolidated claims and was submitted to the jury. Petitioners submitted to the trial court a special issue regarding whether a name-clearing hearing had been requested by Rosenstein. Petitioners also submitted proposed jury instructions defining policymakers and explaining that municipal liability must be based on official policy. The trial court refused to submit these issues and instructions to the jury and City of Dallas objected. The jury returned a verdict in favor of Rosenstein and the district court entered judgment upon the jury's verdict. The City of Dallas filed motions for partial judgment, and for judgment notwithstanding the verdict or, alternatively, for a new trial. The district court denied the City's motions, and the City appealed.

A divided panel of the court of appeals vacated the judgment as to Rosenstein's slander claim and the award of punitive damages for slander, upheld Rosenstein's recovery on his civil rights claim and remanded for modification of damages and attorney's fees. (App. 1 - App. 20). The panel majority specifically held that, "in a §1983 action for denial of a name-clearing hearing, the Plaintiff's damages for loss of the opportunity to clear his name of false and defamatory charges include any harm to his reputation and career." (App. 10). The panel majority also implicitly held that the Chief of Police was a final policymaker for the City of Dallas. (App. 7 - App. 8).

On July 12, 1989, Petitioner requested a rehearing en banc of the panel's decision. The court of appeals granted en banc review on September 7, 1989. On May 14, 1990, a sharply divided en banc court of appeals reinstated the opinion of the panel majority with the exceptions of the

language in the opinion discussing damages and one footnote relating to the standard for implicating a liberty interest in public employee discharge cases. (App. 21). Although the en banc court refused to adopt the panel majority's language regarding recovery of damages to one's reputation, the court did adopt the panel majority's result awarding such damages. The en banc court also adopted the panel majority's holding regarding jury issues and instructions.

REASONS FOR GRANTING THE PETITION

This Court should grant the City's petition for writ of certiorari because (1) this case involves significant issues of national importance; (2) the court of appeals decision constitutes a serious deviation from this Court's prior rulings; and (3) this case impermissibly expands municipal liability under 42 U.S.C. §1983.

A. THE RULES ANNOUNCED BY THE COURT OF APPEALS

The en banc court of appeals decision has the effect of announcing the following rules:

> (1) A probationary municipal employee's request for an appeal of his discharge shall always be deemed an implied request for a name-clearing hearing.
>
> (2) Even though a probationary municipal employee has no property interest in his employment and is not entitled to appeal his discharge, a municipal employer's legitimate refusal to grant a probationary employee's

request for an appeal of his discharge shall always be deemed a refusal to grant the employee's implied request for a name-clearing hearing.

(3) A municipality shall be deemed to have an official policy of refusing requests for name-clearing hearings if one such incident occurs in which an implied request is deemed refused. One such incident shall be deemed official municipal policy even if the refusal is made by a city employee whose actions are subject to supervision and control by the city manager and city council.

(4) A person who has been denied the opportunity to have a name-clearing hearing is entitled to recover damages for his general loss of reputation even though the failure to provide such a hearing did not cause the loss of reputation.

B. SIGNIFICANT ISSUES OF NATIONAL IMPORTANCE

This case involves significant issues of national importance such as a municipality's right to adequate notice of a request for a name-clearing hearing, the requirements to establish official municipal policy under 42 U.S.C. §1983 and the damages available to one who has been denied a name-clearing hearing.

As a result of the court of appeals decision, municipal employers will no longer be afforded the fundamental right of reasonable notice. Municipal employers will be left to guess whether a discharged employee has put them on notice of a request for a name-clearing hearing. The guessing game involves a great deal of peril for

municipalities since a single wrong guess can translate not only into a deemed refusal of a particular implied request, but can now provide sufficient evidence to establish an official municipal policy of refusing all requests for name-clearing hearings thus subjecting the municipality to damages and attorney's fees under 42 U.S.C. §1983. The peril to cities is only heightened when one realizes that, as a result of the court of appeals decision, the damages available to one denied a name-clearing hearing include losses to the discharged employee's general reputation.

C. DECISION DEVIATES FROM THIS COURT'S RULINGS

The court of appeals decision deviates from several of this Court's prior rulings. First, the decision is contrary to *Perry v. Sindermann*, 408 U.S. 593, 603 (1972) which held that an employee is entitled to a hearing *if he requests one*. *See also Owen v. City of Independence*, 445 U.S. 622, 633, n.13 (1980). The court of appeals decision commands that a name-clearing hearing be granted to a discharged employee even though that employee never requested such a hearing.

Second, the decision is contrary to *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). *Pembaur* held that in order to hold a local government liable, a plaintiff must establish that the government official had *final* authority to establish municipal policy with respect to the action taken or ordered. *Pembaur*, at 481. *Praprotnik* held that if the decision of an official is subject to review, that official

is not a policymaker. *Praprotnik*, at 126. The court of appeals decision in this case violates *Pembaur* and *Praprotnik* by finding a municipality liable under 42 U.S.C. §1983 for the single act or decision of a police chief whose actions or decisions are subject to review by the city manager and city council. Finally, the decision is contrary to *Paul v. Davis*, 424 U.S. 693 (1976) and *Carey v. Piphus*, 435 U.S. 247 (1978). *Paul* held that reputation alone is not a protected liberty interest. The court of appeals decision deviates from *Paul* by allowing recovery for general loss of reputation. *Carey* held that constitutional damages must flow from the constitutional right infringed, i.e., that the remedy must fit the right. *Carey*, at 258-59. In the present case, the right involved is the procedural right to have a name-clearing hearing. The name-clearing hearing is designed to ensure that the discharged employee has the liberty to seek other employment without government interference. For the denial of a procedural right that implicates a liberty interest, the court of appeals has fashioned a remedy that implicates a non-existent property interest. Beside the fact that Rosenstein's liberty interest in other employment was never jeopardized, the failure to provide Rosenstein with a name-clearing hearing was simply not the cause of any loss he suffered to his reputation. If Rosenstein suffered any loss of reputation, it was because of statements made about him by Captain Milliken *not* because he was denied a name-clearing hearing. The court of appeals decision, contrary to this Court's holding in *Carey*, improperly allows Rosenstein to recover damages that were not caused by his alleged constitutional deprivation.

D. EXPANSION OF MUNICIPAL LIABILITY

The court of appeals decision expands municipal liability in several ways. First, cities will no longer be able to depend on receiving reasonable notice of what type of review or hearing a discharged employee is seeking. Unless cities give every discharged employee a name-clearing hearing, they will be subjecting themselves to liability. Second, the single decision of a city employee will now be sufficient to establish official municipal policy even though that employee's decision is subject to review by higher-ranking city officials. Third, a city will now be liable to discharged employees for losses those employees suffer to their general reputation even if the city's alleged constitutional violation did not cause the employee to suffer a loss to his reputation. Finally, the court of appeals decision puts the City of Dallas in the peculiar position of paying damages to Rosenstein for a cause of action for which he is not entitled to recover. Because the district court improperly submitted the issue of damages to the jury in the disjunctive – allowing reputational damages to be awarded for slander *or* for a denial of a name-clearing hearing – it is impossible for a reviewing court to sort out which damages are properly associated with the slander cause of action and which with the denial of the name-clearing hearing. As a result, although the court of appeals dismissed the slander cause of action, it could not dismiss the slander damages award. The result is unjust for the City of Dallas and disturbing for cities nationwide. Because it obscures the causal connection required between Rosenstein's causes of action and the damages available for those causes, the

court of appeals decision is a defacto expansion of municipal liability under 42 U.S.C. §1983. This expansion of municipal liability, a direct result of the plain error contained in the jury instructions, is an obvious instance of injustice or misapplication of law that calls for this Court's review. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). This Court should not allow the court of appeals decision to remain in effect since it awards damages on a claim for which Rosenstein has no right to recover.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. BRANDT
Assistant City Attorney

August 1990.

App. 1

Howard M. ROSENSTEIN,
Plaintiff-Appellee,

v.

The CITY OF DALLAS, TEXAS,
Defendant-Appellant.

No. 87-1888.

United States Court of Appeals,
Fifth Circuit.

June 28, 1989.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, REAVLEY and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

This appeal challenges a judgment against the City of Dallas for violation of the plaintiff's due process rights under federal civil rights law and against Donald Milliken and the city for slander under state law. We vacate the judgment, upholding the recover on the civil rights claim, and remand for modification of damages.

In March 1984, Amy Bradley, a Dallas police officer, received several harassing and obscene telephone calls. Bradley named the plaintiff, Howard M. Rosenstein, a fellow police officer, as the person who made the calls. An Internal Affairs Department investigation concluded that Rosenstein had made the calls, and Rosenstein was terminated from his position as a Dallas police officer. Rosenstein had been employed by the City of Dallas for less than one year and was a probationary employee at

the time of his termination. Shortly thereafter, police Captain Milliken made public the charges against Rosenstein in statements to the press concerning the discharge. Rosenstein sought to challenge the decision of the police department but was denied further consideration or hearing on the ground that no appeals procedure was available to one in his status as a probationary employee.

Rosenstein denied that he made the telephone calls and brought this action in the Northern District of Texas seeking damages for violation of his constitutional rights pursuant to 42 U.S.C. § 1983 and for violations of state law. Rosenstein's § 1983 claim was based principally upon the city's denial of a name-clearing hearing to him. His state law claims for slander were based on the statements of Captain Milliken. After trial of the plaintiff's consolidated claims against the City of Dallas and Captain Milliken, the court entered judgment on the jury verdict in favor of Rosenstein.

The Denial of a "Name-Clearing" Hearing

It is now beyond any doubt that discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name. *See Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976); *Paul v. Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 218, 97 L.Ed.

216 (1952). We have held that public officials do not act improperly in publicly disclosing charges against discharged employees, but they must thereafter afford procedural due process to the person charged. *In re Selcraig*, 705 F.2d 789, 798 (5th Cir.1983). Moreover, the process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee. *Roth*, 408 U.S. at 573 n. 12, 92 S.Ct. at 2707 n. 12. If a government employer discharges an individual under circumstances that will do special harm to the individual's reputation and fails to give that individual an opportunity to clear his name, however, the individual may recover monetary damages under § 1983 for the deprivation of his liberty under the Fourteenth Amendment. *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13, 100 S.Ct. 1398, 1406 n. 13, 63 L.Ed.2d 673 (1980). To succeed on this § 1983 claim for the denial of a name-clearing hearing, the employee must prove the following: that he was discharged,[1] that defamatory charges[2] were made

---

[1] Reputation alone is not a constitutionally protected interest. *Paul v. Davis*, 424 U.S. at 701, 96 S.Ct. at 1160-61; *White v. Thomas*, 660 F.2d 680, 684 (5th Cir.1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982). Reputation must be impugned in connection with the termination of employment. *Paul v. Davis*, 424 U.S. at 710, 96 S.Ct. at 1165.

[2] *See Codd v. Velger*, 429 U.S. 624, 628, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977). The Supreme Court has made clear that a liberty interest arises in this context if the charges put one's reputation at stake, impugn one's good name, honor, or integrity or impose a stigma that will foreclose freedom to take advantage of other employment opportunities. *See Roth*, 408

(Continued on following page)

(Continued from previous page)

U.S. at 573, 92 S.Ct. at 2707. Settling on a term that adequately characterizes the type of charges which give rise to a liberty interest under *Roth* has been a source of much difficulty for this court; our choice of the term "defamatory" is deliberate. In the past we have usually employed the term "stigmatizing." *See Campos v. Guillot*, 743 F.2d 1123, 1126 (5th Cir.1984). Stigma, however, has not proven to be a concept capable of much precision. At times we have attempted to supplement "stigmatizing" with the notion of "a badge of infamy." *See Evans v. City of Dallas*, 861 F.2d 846, 851 (5th Cir.1988); *Ball v. Board of Trustees of Kerrville Independent School Dist.*, 584 F.2d 684, 685 (5th Cir.1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1535, 59 L.Ed.2d 788 (1979). At other times we have suggested that "stigmatizing" requires the plaintiff to prove that "her employment or employment opportunities were damaged in addition to her reputation," *Myrick v. City of Dallas*, 810 F.2d 1382, 1385 (5th Cir.1987), or that "the claimant must show that damage to his reputation and employment opportunities has in fact occurred." *Evans*, 861 F.2d at 851. Our efforts to define "stigmatizing" have only led us further from the meaning of *Roth*.

The dissent accuses us of attempting "to obliterate the term 'stigmatize' from the printed books." We have not been so bold. We do believe that the term "stigmatize" has proven unnecessarily confusing, but by characterizing the type of charge the triggers a liberty interest as "defamatory," we in no way change the law. The meaning of "defamatory" is well settled and familiar; it better addresses the range of meanings intended by the Supreme Court; and it provides better direction for trial courts. Furthermore, our use of the term "defamatory" in this manner is hardly unprecedented. *See Owen v. City of Independence*, 445 U.S. at 633 n. 13, 100 S.Ct. at 1406 n. 13; *Paul v. Davis*, 424 U.S. at 709, 96 S.Ct. at 1164; *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C.Cir.1988); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1495 (9th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988); *White v. Thomas*, 660 F.2d at 684; *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338, 341 (5th Cir.1978). The Seventh Circuit has held that if a claim does not succeed in alleging "actionable defamation," *"a fortiori* it does not allege a violation of the Constitution." *Clark v. Maurer*, 824 F.2d 565, 566 (7th Cir.1987).

against him in connection with the discharge,[3] that the charges were false,[4] that no meaningful public hearing was conducted pre-discharge[5], that the charges were made public,[6] that he requested a hearing in which to clear his name,[7] and that the request was denied.[8]

---

[3] The charges must be connected with the discharge but need not actually cause the discharge. *Owen*, 445 U.S. at 633 n. 13, 100 S.Ct. at 1406 n. 13; *Wells v. Hico Independent School Dist.*, 736 F.2d 243, 256 n. 17 (5th Cir.1984), *cert. denied*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985). We emphasize, however, that the charges must be more than merely adverse; the charges must be the type that might seriously damage the employee's standing and associations in the community, that blacken his good name or impair his employment opportunities. *See Wells*, 736 F.2d at 256 n. 16. Moreover, mere discharge, without specific defamatory charges, will not implicate a liberty interest even though it might make the employee less attractive to other employers. *Roth*, 408 U.S. at 574 n. 13, 92 S.Ct. at 2707 n. 13; *Wells*, 736 F.2d at 256.

[4] *Codd*, 429 U.S. at 628, 97 S.Ct. at 884.

[5] *Campos*, 743 F.2d at 1126.

[6] *Bishop v. Wood*, 426 U.S. at 348-50, 96 S.Ct. at 2079-80; *Campos*, 743 F.2d at 1126. An employee may prove that the government agency is likely to make the charges public or that information about the charges is available to the public, although not publicized by the government. *See Wells*, 736 F.2d at 256. There will be no liability, however, if the agency has carefully kept the charges confidential and the plaintiff caused them to be made public. *Campos*, 743 F.2d at 1126.

[7] *Campos*, 743 F.2d at 1126.

[8] A name-clearing hearing is not a prerequisite to publication, and the state is not required to tender one prior to disclosing the charges or discharging the employee. *In re Selcraig*, 705 F.2d at 796. The state deprives an employee of a liberty interest only when it denies his request for an opportunity to contest the charges and clear his name.

The city argues that the plaintiff did not request a hearing. It is undisputed, however, that Rosenstein requested access to the police department's established appeal procedure to contest the charges. On May 10, 1985, Rosenstein wrote to the Dallas City Manager that "I was fired from the Dallas Police Department for something that I did not do," and he "request[ed] an appeal from this decision." In this case where the only issue was Rosenstein's guilt or innocence of the particular charge that stigmatized him, his request to participate in established grievance, appeals, or other review procedures to contest defamatory charges was sufficient to state a request for a name-clearing hearing. A discharged employee need not use the term "name-clearing hearing." *Cf. Owen*, 445 U.S. at 626-29, 100 S.Ct. at 1403-04 (noting that fired police chief demanded only an appeal and was refused on the grounds that the city charter provided for no appellate procedure).

The governmental employer need not grant the discharged employee access to its established appeals procedures, but may provide an alternative procedure, or even an ad hoc hearing, solely for the purpose of allowing the employee to clear his name. An employer electing to implement a special procedure, however, must notify the discharged employee that it will give him access to the special name-clearing procedure if he chooses to take advantage of it; the state must "make known to the stigmatized employee that he may have an opportunity to clear his name upon request." *In re Selcraig*, 705 F.2d 789, 796 (5th Cir.1983). An employer's denial of an employee's request to appeal the employer's discharge decision, which rested on guilt of the stigmatizing charge, is a

denial of a name-clearing hearing unless the employer specifically notifies the employee of the availability of an alternative procedure, which will provide the employee with a public forum to clear his name before the governing body that discharged him.

Not only did the City of Dallas fail to notify Rosenstein that he might take advantage of some alternative or ad hoc hearing procedure, city officers made it perfectly clear that he would not be allowed any procedural avenue whatsoever to clear his name. In the letter formally discharging Officer Rosenstein and informing him of the charges, Police Chief Billy Prince stated: "Because you are a probationary employee of the Dallas Police Department, my decision in this matter is final." The City's response to Rosenstein's letter to the City Manager requesting an appeal concluded the matter by stating: "[I]n accordance with the Police Code of Conduct the decision of the Chief of Police is final. You were a probationary employee and therefore ineligible for further appeal rights." We need not reach the question of whether the jury instructions adequately stated all the elements of a claim for the denial of a name-clearing hearing because as a matter of law the record establishes Rosenstein's claim.

Municipal Liability

The City of Dallas complains of the district court's refusal to instruct the jury to the effect that the city's liability for the civil rights violation depended upon Rosenstein proving that the city council had delegated policy-making authority to the officer who denied him a name-clearing hearing. That instruction was unnecessary

in the state of this record. The Chief of Police testified that he set all of the policies for the police department, and the city attorney neither questioned the Chief upon that statement nor raised an issue to the contrary. The city is liable for the action of the official responsible for establishing policy with respect to the matter. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986). The hearing was denied although both the Chief of Police and the City Manager were aware of Rosenstein's desire for a hearing. There was no need to prove a city policy, although it was significant in this respect that the Assistant City Manager who had supervisory responsibility for the police department testified that he did not know what was meant by "name-clearing hearing."

The Slander Cause of Action

Rosenstein also sued under state slander law for damages caused by the publication of the defamatory charges. Under Texas law municipalities are granted broad immunity from liability when performing governmental functions. *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39 (Tex.1986). A Texas court of appeals has recently held that defamation of a police officer by city officials in the course of discharging that police officer is protected under the city's governmental immunity and, as an exercise of a governmental function, is not actionable against either the city or the officials under state slander law. *City of Dallas v. Moreau*, 718 S.W.2d 776, 779-80 (Tex.App. – Corpus Christi 1986, writ ref'd n.r.e). This decision controls Rosenstein's state law claims, which must be dismissed.

Damages

The district court awarded damages to the plaintiff for lost earnings, mental anguish and suffering, harm to the plaintiff's reputation and career, and punitive damages against Captain Milliken. The Supreme Court has held that when only a liberty interest is infringed, the plaintiff is entitled to only nominal damages or to any actual damages, such as emotional distress, that can be proved to result from the infringement of the liberty interest. *Carey v. Piphus*, 435 U.S. 247, 260-63, 98 S.Ct. 1042, 1050-52, 55 L.Ed.2d 252 (1978). Rosenstein did not have a property interest in his job and may not recover damages for the loss of that job. The district court, therefore, should have disregarded as immaterial the jury's finding of $4087.10 in damages for lost earnings.

An employee may not recover directly under § 1983 for slanderous statements made by his employer, but he is entitled under federal law to a hearing to clear his name if the statements were made in connection with termination of his employment. We can find no appellate court opinion that directly addresses the question of whether damages to reputation are recoverable when a name-clearing hearing is denied.[9] At least two cases in

---

[9] The rule of *Paul v. Davis*, 424 U.S. at 701, 96 S.Ct. at 1161, that reputation alone is not a constitutionally protected interest is not in point. The question presented in *Paul v. Davis* was what circumstances give rise to a right to a name-clearing hearing, not what are the damages for the denial of such a hearing. The Supreme Court did not overrule the holding in *Roth* that charges which blacken one's name, but do not necessarily cause the loss of employment opportunities, can constitute part of a claim for a

(Continued on following page)

this court have apparently assumed, without deciding, that damages for harm to reputation are recoverable in this type of action. *See In re Selcraig*, 705 F.2d at 798; *White v. Thomas*, 660 F.2d at 682. We hold that in a § 1983 action for denial of a name-clearing hearing, the plaintiff's damages for loss of the opportunity to clear his name of the false and defamatory charges include any harm to his reputation and career caused by the charges made against him that he is able to

---

(Continued from previous page)

name-clearing hearing, rather the Court reaffirmed the holding in *Roth* that such charges give rise to a liberty interest only when made in the course of termination from public employment:

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected to any refusal to rehire would be actionable under the Fourteenth Amendment. . . .

Paul v. Davis, 424 U.S. at 709, 96 S.Ct. at 1164. The Supreme Court specifically held that it was not sufficient to establish a claim under § 1983 "that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment." *Id.* at 710, 96 S.Ct. at 1165. The dissent's misreading of *Paul v. Davis* as holding that a plaintiff may only recover when the false and defamatory charges actually cause the employee to lose a subsequent job results from confusing the circumstances necessary to a trigger a liberty interest with the damages caused by the violation of the liberty interest.

prove.[10] The award of punitive damages, however, falls with the dismissal of the state law slander claim.[11]

Other Matters

Appellants urge that the § 1983 claim and the state law slander claim are separate and independent claims and that the district court erred by awarding attorneys'

---

[10] The dissent notes that "in the years since the writing of *Roth*, the law has been refined to the point that, in a discharge case, the due process clause recognizes only the employee's liberty right not to have the government bar future employment opportunities. . . . " By "refined," of course, the dissent means that an important part of the *Roth* holding has been overturned. There is simply no authority to support that conclusion. In every case in which the Supreme Court has considered the issue the right of a discharged employee to clear his name of charges that blacken his reputation, in addition to charges that foreclose future employment opportunities, has been recognized. The language in the opinions of this court which might be read otherwise is dicta and did not even address the question of damages. The question presented by this case is a simple one; what are the damages when one is denied his Fourteenth Amendment right to *clear his name* of charges that *blacken his reputation*? We believe that the answer given here is the only possible one.

[11] Although the jury could have found the damages for harm to reputation under both the slander cause of action and the § 1983 action, our holding that the slander claim is barred by governmental immunity does not affect those damages. Although the jury was instructed that statements charging criminal activity were "slanderous *per se*," the jury was not instructed to presume damages for harm to reputation. Moreover, the record amply supports Rosenstein's claim that his reputation and standing in the community were harmed and that his career suffered.

fees for time spent on the now unsuccessful slander claim. *See Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). Both claims share a common core of facts, and the damages theories for both claims are identical. We are not prepared to state that the district court's award of attorneys' fees was an abuse of discretion. *See Graves v. Barnes*, 700 F.2d 220, 221 (5th Cir.1983). Because the district court denied the defendants' motion for judgment n.o.v. and thus did not consider that the plaintiff had urged an unsuccessful claim, we cannot know whether the district court considered the appellants' arguments in awarding attorneys' fees. We therefore direct the district court on remand to reconsider its award of attorneys' fees in light of our holding that a judgment n.o.v. should have been entered on the slander claim.

The appellants also argue that the district court erred in denying their motion for new trial on the grounds that the court erroneously admitted irrelevant evidence concerning Officer Rosenstein's commendations, that the district court submitted an improper instruction to the jury regarding custom and policy, that the district court refused to submit a separate issue on whether Rosenstein requested a name-clearing hearing, and that the district court's errors confused the jury and prejudiced the defendants. Evidence of Officer Rosenstein's previous commendations was relevant as background and as evidence of his professional reputation, which was harmed by the stigma of the false charges. The appellants' other grounds are answered above.

The judgment is VACATED and the case is REMANDED to the district court for modification of

damages against the City of Dallas consistent with this opinion and for the award of attorneys' fees.

E. GRADY JOLLY, Circuit Judge, dissenting in part:

I respectfully dissent because I object to footnote 2 and because the majority allows recovery for damage to general reputation. I otherwise concur.

A.

I object to footnote 2 on two grounds; one is pragmatic, the other substantive. My first objection is that note 2 is dicta, and serves no purpose in resolving the case before us. Second, by its "deliberate" decision to obliterate the word "stigmatize" from the printed books and substitute the annointed term "defamatory" in its stead, I believe the majority has wrongly assumed the authority to rewrite earlier opinions of this court and the Supreme Court.

Judge Reavley is correct in his reading of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), to allow a discharged employee two avenues for complaining that his liberty interest has been implicated as a result of his discharge by a government employer: first, if the charge made against the employee "might seriously damage his standing and associations in his community," for example, a charge "that he has been guilty of dishonesty, or immorality," *id.* at 92 S.Ct. 2707; and second, if the state "imposes on him a stigma or other disability that forecloses his freedom to take advantage" of other comparable employment in his chosen profession.

However, I am convinced that in the years since the writing of *Roth*, the law has been refined to the point that, in a discharge case, the due process clause recognizes only the employee's liberty right not to have the government bar future employment opportunities by publicly assigning false reasons for discharge that stigmatize the employee in obtaining employment in his line of work. The reasons offered to support the employee's discharge must defame his professional competence in such a way as to characterize him as fundamentally unfit for that line of work.

In *Paul v. Davis*, 424 U.S. 693, 696, 96 S.Ct. 1155, 1158, 47 L.Ed.2d 405 (1976), the Supreme Court itself said that

> [w]hile we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

Id. 96 S.Ct. at 1160-61.

Paul makes clear that reputation alone is not a protected liberty interest. In a discharge-from-employment case, an employee's liberty interest is infringed only when the government's defamatory charges stigmatize the employee in connection with his future employment opportunities. *Id.*, 96 S.Ct. at 1164-65.

In the years following the *Paul* opinion, the Court has made it even clearer that charges that are only defamatory do not of themselves implicate liberty interests; the charges must be stigmatizing. In *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), the Supreme Court repeatedly used the word "stigma" or a variant of that term to explain the plaintiff's burden in a liberty-interest case. Although the court at one point characterized the impression the employer must make as "false and defamatory," "defamatory" as used in context requires that those defamatory charges be stigmatizing. *Id.*, 97 S.Ct. at 884. In *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 83, 98 S.Ct. 948, 951, 55 L.Ed.2d 124 (1978), the Court continued to recognize the right to a good reputation as protected only against charges that so stigmatized the plaintiff that her opportunities to a career in her chosen profession were substantially impaired. Furthermore, the Court characterized its holding in *Bishop v. Wood*, 426 U.S. 341, 349, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976), where a policeman was discharged for alleged defamatory reasons, as not amounting to "a stigma infringing one's liberty." *Id.* 98 S.Ct. at 952.

In turning to our cases, I am thoroughly persuaded that, on the whole, we have faithfully followed the Supreme Court concept that a plaintiff must show that he has been stigmatized. In *Ball v. Board of Trustees of Kerrville Independent School District*, we stated that for a charge to be stigmatizing it must be worse than merely adverse; it must be such as would give rise to a "badge of infamy," public scorn, or the like. 584 F.2d 684, 685 (5th Cir.1978) *cert. denied*, 440 U.S. 972, 99 S.Ct. 1535, 59 L.Ed.2d 788

(1979). "To establish . . . a due process deficit, [the plaintiff] must establish that in the course of terminating his employment, the agency prepared a report, without giving him notice and an opportunity to be heard, which was (a) false, (b) stigmatizing and (c) published." *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir.1979) (footnote omitted). "A constitutionally protected liberty interest is implicated only if an employee is discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities. *White v. Thomas*, 660 F.2d 680, 684 (5th Cir.1981) (citing *Codd v. Velger*). "A party does not have a liberty interest in his reputation protected by the fourteenth amendment unless he can establish that the governmental employer's charges against him rise to such a level that they create a badge of infamy which destroys the claimant's ability to take advantage of other employment opportunities." *Evans v. City of Dallas*, 861 F.2d 846, 851 (5th Cir.1988).

I do not contest the majority's observation that the precedents are sometimes inconsistent and somewhat confusing. On at least two occasions our court appears to revive the *Roth* dichotomy of reputation and stigma by stating that "[t]o establish a liberty interest, an employee must demonstrate that his government employer has brought false charges against him that 'might seriously damage his standing and associations in his community,' *or* that impose a stigma or other disability 'that forecloses freedom to take advantage of other employment opportunities.' " *Wells v. Hico*, 736 F.2d 243, 256 (5th Cir.1984)

(*quoting Roth*) (emphasis added). See also *Campos v. Guillot*, 743 F.2d 1123, 1125 (5th Cir.1984) (quoting same language from *Roth*). In both *Wells* and *Campos* the court was quoting from *Roth* without adverting to the later fusing of reputation with stigma in *Bishop* and *Paul*. However, both the *Wells* and *Campos* panels implicitly acknowledged the merger when each went on to restate the proposition of *Paul* that reputation alone is not a constitutionally protected interest, even though state law may create an action for defamation. *Wells*, 736 F.2d at 256; *Campos*, 743 F.2d at 1125. Thus, the conclusion I reach is that our precedents, when read as a whole, plainly require a plaintiff to prove more than that the governmental employer's charges were defamatory; he must prove that they were *stigmatizing*, and, specifically, that they were so damaging as to foreclose employment opportunities.

The majority, on the other hand, by choosing the word "defamatory," in footnote 2, takes several steps back through the cases to *Roth* and suggests that harm to general reputation infringes a protected liberty interest. Because I believe that the state of the law today makes a perfectly clear distinction between "defamatory" and "stigmatizing," and that a liberty interest of an employee is infringed only when the government makes charges that place a stigma upon him that forecloses other employment opportunities, I would choose "stigmatizing," not "defamatory," to describe the nature of the charge that implicates a liberty interest. I therefore respectfully dissent from the inclusion of footnote 2 in this opinion.

B.

I further part company with my distinguished brothers in their holding that Rosenstein may recover damages for general loss of reputation. In my view, such a holding – for which the majority acknowledges there is no case authority – is clearly contrary to *Paul v. Davis*, 424 U.S. 693, 696, 96 S.Ct. 1155, 1158, 47 L.Ed.2d 405 (1976), and *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

The majority acknowledges in footnote 1, as it must, that reputation alone is not a constitutionally protected interest; only damage to reputation that results in a loss of a more substantial interest, such as the loss of employment opportunity that is involved here, is actionable under the Constitution. *Paul*, 96 S.Ct. at 1161. I should think, therefore, that the majority would acknowledge the fundamental principle that constitutional damages must flow from the constitutional right infringed. Since *Paul* makes clear that the City of Dallas did not infringe any constitutional right of Rosenstein when it damaged his general reputation apart from his substantial interest in employment, it is difficult to see how he can collect damages from the city for no legally recognizable wrong that was committed against him.

Even if, however, this logic is unpersuasive to the majority, it should be persuaded by the United States Supreme Court's holding in *Carey v. Piphus*:

> In order to further the purpose of section 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question – just

> as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

Id., 98 S.Ct. at 1050. The rule is simple. We must fit the remedy to the right protected. The right protected is not reputation, but the liberty to seek employment opportunities without improper government interference. Thus, if we are faithful to *Carey*, we can only allow compensation that results from damages suffered from the impairment of that right.

Of course, under this rule, the plaintiff effectively recovers for harm to reputation, but he recovers only for a particular and special harm done to his reputation, that is, the harm that causes loss of job opportunities. Such a result flows directly from *Paul* and *Carey: Paul* specifically holds that one's constitutional liberty rights are violated only when the government harms one's reputation in connection with the loss of a more substantial interest, here, the right to earn a living; *Carey* specifically holds that under section 1983 compensation should be tailored to redress losses for violation of the particularized constitutional right. Because I believe that the majority cuts a back door in the case law to collect damages when the front door was closed by *Paul*, and because I believe that the majority closes its doors on the rule established in *Carey*, I respectfully dissent from the majority's allowing recovery for damage to general reputation.

C.

In conclusion, because the majority opinion, both in footnote 2 and in its creating recovery for all damage

done to reputation, erodes distinctions, drawn by Supreme Court authority and by our authority, between common law defamation and deprivation of liberty under the Constitution to earn a living in one's chosen line of work, I dissent.

Howard M. ROSENSTEIN,
Plaintiff-Appellee,

v.

The CITY OF DALLAS, TEXAS, and
Donald Milliken,
Defendants-Appellants.

No. 87-1888.

United States Court of Appeals,
Fifth Circuit.

May 14, 1990.

Appeal from the United States District Court for the Northern District of Texas; Jerry Buchmeyer, Judge.

Before CLARK Chief Judge, GOLDBERG, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

PER CURIAM:

The en banc court reinstates the opinion of the panel majority (876 F.2d 392) with the following exceptions: footnote 2 and the writing and footnotes under "Damages." The only objection made by any appellant to the damage award, or to the form of submission of the damages to the jury, was to the punitive damages awarded against Donald Milliken. Other errors, if any, in the submission and award of damages, have been waived. *See Galtieri v. Wainwright*, 582 F.2d 348, 352 n. 8 (5th Cir.1978); *Farrar v. Cain*, 756 F.2d 1148, 1150 (5th Cir.1985).

The judgment against Donald Milliken is reversed and the claim against him is dismissed. The district

court's judgment against the City of Dallas is in all respects affirmed.

REVERSED IN PART, AFFIRMED IN PART.

JERRY E. SMITH, Circuit Judge, with whom CHARLES CLARK, Chief Judge, GEE, GARWOOD, and EDITH H. JONES, Circuit Judges, join, dissenting:

The majority fundamentally errs in asserting that plaintiff Howard Rosenstein requested a name-clearing hearing following notice of his termination. The record is wholly devoid of anything that would have put the City of Dallas on notice that Rosenstein was seeking anything more than an appeal for the purpose of overturning his termination. As the principle of fair notice runs throughout our jurisprudence, it is surprising that the majority would treat the concept of notice so casually in the instant context.

It is axiomatic that a terminated public employee must affirmatively request a name-clearing hearing in order to be entitled to one. Most recently, for example, in *Rathjen v. City of Houston*, 878 F.2d 836, 840 (5th Cir.1989), this court observed that "*Perry v. Sinderman[n]*, 408 U.S. 593, 603, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570, 580 (1972) holds only that an employee is entitled to a hearing if he requests one. . . ." Similarly, in *Campos v. Guillot*, 743 F.2d 1123, 1126 (5th Cir.1984), we noted that "a discharged public employee is entitled to a 'name-clearing' hearing . . . when he requests such a hearing." The panel opinion that the majority substantially adopts indeed recognizes that a name-clearing hearing must be requested. *Rosenstein v. City of Dallas*, 876 F.2d 392, 396 (5th Cir.1989) (citing *Campos*, 743 F.2d at 1126).

The majority gives scant attention to this issue, however. It concludes, incorrectly, that the request for an appeal of the decision to dismiss is always tantamount to a request for a name-clearing hearing.[1] No authority is cited for this bold proposition, which is undermined by the majority's own legal analysis and supported only by its *ipse dixit*.

Early in its opinion, the majority correctly and carefully explains that an appeal of a dismissal, on the one hand, and a name-clearing hearing, on the other hand, are clean different things: "[T]he process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee." 876 F.2d at 395 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 n. 12, 92 S.Ct. 2701, 2707 n.12, 33 L.Ed.2d 548 (1972)). Rosenstein requested only that the decision to dismiss him be reviewed; he never hinted that he desired a name-clearing hearing as well.

An appeal is an adversarial proceeding resulting in a decision to uphold or reverse disciplinary action. In a name-clearing hearing, on the other hand, the employer need not produce any evidence, as nothing is to be proved or decided; the employee is merely given a public

---

[1] "An employer's denial of an employee's request to appeal the employer's discharge decision, which rested on guilt of the stigmatizing charge, is a denial of a name-clearing hearing unless the employer specifically notifies the employee of the availability of an alternative procedure, which will provide the employee with a public forum to clear his name before the governing body that discharged him." *Rosenstein*, 876 F.2d at 396.

opportunity to present his or her side of the story. The city's written provisions that Rosenstein claims he was trying to invoke are geared toward reconsideration of the disciplinary decision; nothing about them suggests that they are designed to afford a name-clearing opportunity; nor is there any evidence that the city would have refused a name-clearing proceeding if Rosenstein had intimated that he wanted one.

As the majority notes, *id.* at 396, Rosenstein's letter stated, in pertinent part, "I was fired . . . for something that I did not do. . . . I hereby request an appeal from this decision." Rosenstein never even requested a *hearing*, much less intimated that he wanted anything resembling a *name-clearing* hearing.

The issue, of course, is whether the city was on fair notice that Rosenstein made the request that the law requires. His case might be stronger if he had made a more general plea for redress. Instead, he made a specific request for an *appeal*, lending the recipient reasonably to conclude that such relief was being requested to the exclusion of other relief.[2]

---

[2] To use a common analogy, Rosenstein specifically requested an apple but is deemed by the majority to have requested an orange. Or perhaps more appropriately, he requested an apple, is deemed to have requested an apple and an orange, and is being given by this court a gold Rolex watch.

To the contrary, however, the proper construction of Rosenstein's letter calls for the application of the rule *"expressio unius est exclusio alterius"* – i.e., "the expression of one is the

(Continued on following page)

At oral argument, Rosenstein's counsel relied in part upon the fact that Rosenstein's letter disputed the charges against him. The suggestion is that such statement implied a desire to "clear the air" regarding the stigma of the allegations. To the contrary, however, in the context of public employee law in Texas, Rosenstein's denial of the accusations underscores the fact that only a formal appeal of his dismissal is what was being sought.

In Texas, the general statute providing for appeals by police officers and firefighters from disciplinary actions, in cities with populations of 10,000 or more that have

---

(Continued from previous page)

exclusion of others," *See, e.g., United States v. Wells Fargo Bank,* 485 U.S. 351, 357, 108 S.Ct. 1179, 1183, 99 L.Ed.2d 368 (1988).

> Drawing an inference of an intent to exclude a particular result from the failure to expressly proscribe that result is the essence of the common law maxim 'expressio unius est exclusio alterius,' often applied as an aid in statutory construction. The maxim embodies a sensible insight into the customary manner in which language is used to communicate ideas. Simply stated, '[i]t expresses the learning of common experience that generally when people say one thing they do not mean something else.' 2A C. Sands, *Statutes and Statutory Construction* § 47.24 (4th ed. 1973). . . .

Duke v. University of Tex., 663 F.2d 522, 526 (5th Cir. Dec.1981) (citations omitted) (quoted in *Quarles v. St. Clair,* 711 F.2d 691, 699 n. 22 (5th Cir.1983)). While Rosenstein's letter is not a statute, the question of whether the city had fair notice should be analyzed in terms of such a customary rule for interpreting the written word.

adopted the statutory scheme by referendum,[3] is Tex.Loc.Gov't Code Ann. § 143.010(b) (Vernon 1988).[4] That provision requires that "[t]he appeal must also contain a statement denying the truth of the charge as made. . . . " Significantly, the requirement is jurisdictional. *City of Temple Fireman's & Policemen's Civil Serv. Comm'n v. Bender*, No. C-9670, 1990 Tex. LEXIS 60 (Apr. 25, 1990); *City of Plano Firefighters' & Police Officers' Civil Serv. Comm'n v. Maxam*, 685 S.W.2d 125, 127-28 (Tex.App. – Dallas 1985, writ ref'd n.r.e.).

Thus, the denial of the truth of the charges can easily be understood as boilerplate, customarily included in letters of appeal because the general statute requires it. To the same effect, although Rosenstein acknowledges that as a probationary employee he was not entitled to utilize the appeal procedures conferred by the Dallas charter and code, he asserts that he was attempting to invoke those procedures in his "appeal" letter. But those procedures, like the scheme set forth in the state statute, deal only with an officer's attempt to regain his job and say nothing about name-clearing devices. Given the context of police appeals in Dallas and Texas, it is wholly unfair for this court to conclude that Dallas city officials were

---

[3] Dallas has not so voted. The point, however, is that the vast majority (approximately 60) Texas cities larger than 10,000 in population regularly utilize the procedure, thus explaining general custom and practice in regard to police officers' appeals in Texas.

[4] At the time of Rosenstein's termination, this provision was codified as Tex.Rev.Civ.Stat.Ann. art. 1269m, § 17(a).

reasonably on notice that Rosenstein was requesting a name-clearing hearing.

Correctly, the majority observes that "[a] discharged employee need not use the term 'name-clearing hearing.' " 876 F.2d at 396. Remarkably, the majority then cites *Owen v. City of Independence*, 445 U.S. 622, 626-29, 100 S.Ct. 1398, 1402-04, 68 L.Ed.2d 673 (1980), as a case in which the fired employee "demanded only [an] appeal and was refused on the grounds that the city charter provided for no appellate procedure." 876 F.2d at 396. In fact, however, the letter in *Owen* patently requested name-clearing relief and stands in stark contrast to Rosenstein's narrow demand to have his dismissal reversed. The relevant portion of the letter in *Owen* is reproduced in the margin.[5]

---

[5] The letter in *Owen* stated,

> My counsel . . . have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.
>
> In spite of your recent investigation and your public statement given to the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.
>
> Such action by you would be in violation of my civil rights as granted by the Constitution and

(Continued on following page)

Finally, but importantly, the record in this case reveals that Rosenstein testified that he was aware, when he wrote his appeal letter, that he was entitled to a name-clearing hearing. That is not surprising, given that Rosenstein was, at that time, a law school graduate. The fact that he never made a more specific request for a procedure to which he was knowingly entitled should hardly be charged to the city's detriment.

It is uncontroverted that the only cognizable constitutional interest in this case is the liberty interest of an alleged denial of a name-clearing hearing. That is distinct and separate from the property interest in employment, which Rosenstein, as a probationer, concededly did not have. His letter requested only a reversal of his firing and was so specific that a reader reasonably could only have inferred that he was not making the requisite demand for a name-clearing hearing.

The majority, however, has taken the untoward step of announcing the rule that a request for re-employment, a property interest, shall always be deemed a request for a name-clearing hearing, a liberty interest implicating a procedure with a wholly different purpose. Here, the request for an appeal was a nullity, as Rosenstein, a probationary employee, had no right to invoke the city's

---

(Continued from previous page)

> Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

445 U.S. at 627 n. 4, 100 S.Ct. at 1403 n. 4.

appeal procedures. *Evans v. City of Dallas*, 861 F.2d 846, 850 (5th Cir.1988) (per curiam). The city officials were justified in ignoring that request as being entirely without legal or practical significance; only by the most bizarre twist of logic could that request be read, in plain English, to connote anything more than it concisely says.

The upshot of the majority opinion is that Rosenstein is rewarded for engaging in an utterly void, useless, and futile act – the attempted taking of an appeal that the law proscribes. Moreover, the majority employs a triple leap of logic: First, Rosenstein is deemed to have requested a name-clearing hearing; second, the city is deemed to have refused his implied request; third, the city is deemed to have a policy or practice of denying name-clearing hearings. Such a policy must be found in order for the city to be liable under 42 U.S.C. § 1983. Yet, absolutely nothing in the record suggests that the city ever – in Rosenstein's case or otherwise – intentionally denied a name-clearing hearing to anyone.

The city did deny Rosenstein's request for reversal, as its probationary provisions patently permitted it to do. Now, in reaching an unexplainable result that suggests unjustified sympathy for a lawyer who knew his rights but failed to pursue them, the majority pronounces that the city, by refusing an appeal that its charter and code forbid, *ipso facto* has violated a constitutional liberty interest by denying a name-clearing hearing that was never requested. This holding undermines our tradition of fair notice before a party can be held accountable and is a misbalancing of the equities, given all of the facts and circumstances of this case. Accordingly, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWARD M. ROSENSTEIN, Plaintiff, v. THE CITY OF DALLAS and DONALD MILLIKEN, Defendant.	§ § § § § § § § §	CA 3-85-2191-R

JUDGMENT

Based upon the verdict of the jury, judgment is entered in favor of the plaintiff, Howard M. Rosenstein, against the defendants, the City of Dallas and Donald Milliken, in the amount of $104,087.10; and judgment is entered in favor of the plaintiff, Howard M. Rosenstein, in the amount of $1,000.00 against the defendant Donald Milliken.

SIGNED this 30th day of April, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWARD ROSENSTEIN, Plaintiff,	§	
v.	§	CA 3-85-2191-R
THE CITY OF DALLAS ET AL., Defendant.	§	

ORDER

It was the intent of this Court to enter a written order denying the defendants' Motion for New Trial and their Motion for Judgment NOV and their Motion for Partial Judgment.

Accordingly, for the reasons stated in open court on August 18, 1987, these motions are DENIED. The defendants do have thirty (30) days from the date of this Order to appeal.

SIGNED this 23rd day of October, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER